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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-232

PETER XAVIER HAINA,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	12
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:

Alderman v. United States, 394 U.S. 165 (1969) 7,8

Berger v. New York, 388 U.S. 41 (1967) 8,10

Jones v. United States, 362 U.S. 257 (1960) 11

Katz v. United States, 389 U.S. 347 (1967) 8,11

Mancusi v. DeForte, 392 U.S. 364 (1968) 11

Silverman v. United States, 365 U.S. 505 (1961) 8

State v. Siegal, 266 Md. 256, 292 A.2d 86 (1972) 7

United States v. Bellosi, 501 F.2d 833 (D.C. Cir., 1974) 9

United States v. Bernstein, 509 F.2d 996 (4th Cir.) *cert. pending*, 421 U.S. 962 (1975) 9

United States v. Brodson, 390 F. Supp. 774 (E.D. Wis. 1975) 9

United States v. Chiarizio, 388 F. Supp. 858 (D. Conn., 1975) 9

United States v. Donovan, 513 F.2d 337 (6th Cir.) *cert. granted*, ____ U.S. ____ (1976) 9

United States v. Giordano, 416 U.S. 505 (1974) 7,8,10

Page

United States v. Kahn, 415 U.S. 143 (1974) 8

United States v. Moore, 513 F.2d 485 (D.C. Cir., 1975) 9

United States v. Ventresca, 380 U.S. 102 (1965) 10

Statutes:

18 U.S.C.:

2518(1)(b)(iv) 4

2518(4)(a) 4

2518(1)(c) 5,10

2518(1)(e) 9

2518(5) 9

2518(8)(d) 9

Art. 27, Ann. Code of Maryland, Secs. 276-302 3

Constitution:

United States Constitution Fourth Amendment 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

PETER XAVIER HAINA,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

The Petitioner, Peter Xavier Haina, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Special Appeals of Maryland in this case.

OPINION BELOW

The opinion of the Court of Special Appeals (App. A, *infra*) is reported at 30 Md. App. 295, 352 A.2d 874.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland was entered on February 26, 1976. A timely petition to the Court of Appeals of Maryland for writ of certiorari was denied on May 25, 1976. This petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

I.

WHETHER AN APPLICATION AND ORDER AUTHORIZING ELECTRONIC INTERCEPTION OF TELEPHONE CONVERSATIONS TRANSPIRING IN A RESIDENCE JOINTLY OCCUPIED BY TWO PERSONS WHICH NAMES ONLY ONE PARTY, WHEREIN EACH IS JUDICIALLY DETERMINED TO BE "KNOWN" WITHIN THE MEANING OF 18 U.S.C. 2518(1)(b)(iv) AND 2518(4)(a), RENDERS ALL DIRECT AND DERIVATIVE EVIDENCE OBTAINED THROUGH THE USE OF THAT WIRETAP INADMISSIBLE AGAINST EITHER OF THE PARTIES.

II.

WHETHER THE COURT OF SPECIAL APPEALS ERRED IN HOLDING THAT THE STATE'S CONCLUSORY ALLEGATIONS OF OBEDIENCE TO 18 U.S.C. 2518(1)(c) RAISED A CONCLUSIVE PRESUMPTION OF COMPLIANCE.

III.

WHETHER A FAILURE TO GRANT A DEFENDANT CHARGED WITH A POSSESSORY CRIME THE AUTOMATIC STANDING REQUIRED BY *JONES v. UNITED STATES* CONSTITUTES A DEPRIVATION OF DUE PROCESS OF LAW.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides, in pertinent part:

> The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law. . .

STATEMENT

The indictment in this case alleged in twenty-one (21) separate counts, that Peter Xavier Haina (Petitioner), Carla W. Strawbridge and thirteen others engaged in a conspiracy to possess and distribute various substances in violation of the Controlled Dangerous Substances Law of Maryland, Art. 27, §§276-302, *Ann. Code of Md.* (1957, 1976 Repl. Vol.), and further charged Petitioner with possession of such substances with intent to distribute.

At Petitioner's trial,[1] typewritten transcripts of sixty-six electronically intercepted telephone calls were admitted into evidence over his objection. Fifty of the transcripts involved Petitioner as a party and eight involved Strawbridge. Strawbridge's conversations inculpated Petitioner in the alleged conspiracy and were substantive evidence on the possessory charges. Each of the sixty-six telephone calls were intercepted pursuant to an Ex Parte Order authorizing wiretaps on the two telephones located at the residence jointly occupied by Petitioner and Strawbridge. That Order stated, *inter alia*, "that probable cause exists to believe that Peter Xavier Haina and other persons '*yet unknown*' have been committing . . . crimes," (R. 274, Blake, State's Exhibit 3, p. 1).[2] (Emphasis supplied) The State's application for the wiretap Order stated, *inter alia*, that the State's Attorney had "reasonable grounds to believe" that the controlled dangerous substances laws were being violated by "Peter Xavier Haina and *other persons yet unknown*," (R. 274, Blake, State's Exhibit 2). (Emphasis Supplied)

Prior to trial, Petitioner moved to suppress all evidence derived from the wiretap on his residence, asserting that the failure to name all known parties in the application and order for the wiretap, in violation of 18 U.S.C. §2518(1)(b)(iv) and (4)(a), tainted all conversations intercepted pursuant to that wiretap, and further asserting that the State's application for the wiretap did not contain a full and complete statement

[1] Petitioner was tried jointly with Strawbridge.

[2] R refers to the record in the Court of Special Appeals. Blake refers to testimony taken at a pre-trial hearing on Petitioner's Motion to Suppress all evidence obtained pursuant to the wiretap.

describing the feasibility of other investigative techniuqes in violation of 18 U.S.C. §2518(1)(c).

The trial judge, reading only the affidavit accompanying the application for the wiretap and refusing to hold an evidentiary hearing, ruled as a matter of law that the feasibility of other investigative techniques had been sufficiently described in the application. (R. 274, Blake, p. 27) The Court then held a hearing on the issue of known parties, and ruled that Petitioner's co-defendant, Strawbridge, was not a known party within the meaning of the statute, and therefore did not have to be named in the application.

During the course of the trial, the State offered as substantive evidence against Petitioner on certain possessory charges a green bag containing a sizable quantity of cocaine and marijuana (the green bag). The green bag was seized from beneath the porch of the house next door to Petitioner's home under color of a search warrant which authorized a search only of the Petitioner's residence. The Petitioner objected and moved to suppress, basing his motion on the alternative theories that the green bag was the fruit of either an illegal wiretap or an unconstitutional search (R. 594). The Court refused to consider either of these artuments on thr ground that neither Petitioner nor Strawbridge had standing to object to the admissibility of the green bag, and held that the bag and its contents were admissible evidence. (R. 621)

Petitioner was convicted of conspiracy to violate the controlled dangerous substances laws, conspiracy to distribute cocaine and marijuana, maintaining a common nuisance and possession of cocaine and marijuana with intent to distribute. Strawbridge was convicted of possession of cocaine and possession of marijuana. (R. 1024)

Both Petitioner and his co-defendant, Strawbridge, appealed as of right to the Court of Special Appeals. That Court found that Strawbridge, although not named in the wiretap application or order, was a known party within meaning of the statute and should have been named as a condition precedent to any electronic interception of her telephone conversations. (App. A, *infra*, pp. 5a-8a) Since the State's case against Strawbridge was based wholly on direct and derivative evidence gleaned from the wiretap on her residence, the Court of Special Appeals felt constrained to reverse her conviction. (App. A, *infra*, pp. 9a, 23a)

The Court of Special Appeals affirmed Petitioner's conviction, holding that the failure of the application and order to name a "known" party (Strawbridge) did not violate Petitioner's rights because he was named in the application and order. (App. A, *infra*, pp. 11a-12a) The Court of Special Appeals also held that an evidentiary hearing on the feasibility of other investigative techniques was not required because the application adequately described the impracticality of utilizing other investigative techniques. (App. A, *infra*, pp. 12a-20a) The Court of Special Appeals further held that the trial court erred in denying Petitioner standing to move for suppression of the green bag, but that such error was harmless because Petitioner failed to show, on the record, that its seizure violated his Constitutional rights. (App. A, *infra*, 22a-23a)

REASONS FOR GRANTING THE WRIT

In holding that direct and derivative evidence obtained against Petitioner by means of a wiretap on the telephones in his residence was not tainted by the failure of the application and order authorizing that

wiretap to name a known party who lived on those premises, the Court of Special Appeals has rendered a decision on an important question of law which has produced conflicting opinions in the federal courts of appeals and which has not been fully resolved by this Court. By the terms of that decision, a failure, whether deliberate or merely negligent, to identify all "known" parties in an application and order for a wiretap on their residence will never invalidate the order nor taint the evidence gained against any other resident who happens to be named, despite the clear indication from this Court, in *United States v. Giordano*, 416 U.S. 550 94 S. Ct. 1820, 40 L.Ed. 2d 341 (1974), that compliance with the integral provisions of Title III is a condition precedent to valid eavesdropping by the government. In *State v. Siegel*, 266 Md. 256, 268, 292 A.2d 86, 96 (1972), the Court of Appeals of Maryland stated that:

> The State urges that no more than substantial compliance with the federal act is essential. . . . We cannot accept this rationalization. The statute sets up a strict procedure that must be followed and we will not abide any deviation, no matter how slight, from the prescribed path.

Guidance from this Court is needed to instruct the federal and state courts on this important and recurring issue.

1. Every person who lives in a particular residence and exercises dominion and control over those premises has a constitutional right, under the fourth amendment, against unreasonable and unauthorized intrusions into his home, and that right is infringed not only by violation of his own privacy, but also by improper interference with the privacy of his invitees and fellow residents. *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L.Ed.2d 176 (1969). Where one occupies a residence that is subjected to electronic eavesdropping

by the government, his fourth amendment rights are violated when the privacy of anyone lawfully on his premises is unreasonably violated by such action, and that violation will entitle him to suppress the fruits of such eavesdropping in a subsequent criminal prosecution. *Alderman v. United States, supra; Silverman v. United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L.Ed.2d 734 (1961); *cf.*, *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967).

2. This Court's admonition, expressed in *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873, 18 L.Ed2d. 1040 (1967), that no legislative scheme sanctioning electronic eavesdropping would be permitted to erode fourth amendment protections provided a guide to Congress in drafting Title III, Omnibus Crime Control and Safe Streets Act of 1968, §802, 18 U.S.C. §§2510-20 (1970) (Title III). Title III represents a legislative policy determination that the federal and state governments must comply with a number of preconditions before they may lawfully eavesdrop. In *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L.Ed.2d 341 (1974), this Court held that suppression is appropriate only for those violations of Title III which are an integral part of the statutory scheme and effectuate the underlying legislative policy. In *United States v. Kahn*, 415 U.S. 143, 155, 94 S. Ct. 1179, 39 L.Ed.2d 297 (1974), it was stated:

> Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cuase to believe that that individual is 'committing the offense' for which the wiretap is sought.

Focusing on this language, various courts have held that the naming of a known party in a warrant application

for electronic eavesdropping is basic to Title III and that the failure to do so will justify exclusion of evidence seized pursuant to the interception order. *See, e.g., United States v. Donovan*, 513 F.2d 337, 341, (6th Cir.) cert. granted, ____ U.S. ____, 47 L.Ed.2d 310 (1976); *United States v. Moore*, 513 F.2d 485 (D.C. Cir., 1975); *United States v. Bernstein*, 509 F.2d 996, 1003-4, (4th Cir.), *cert. pending*, 421 U.S. 962 (1975); *United States v. Chiarizio*, 388 F. Supp. 858, 867-69 (D. Conn., 1975); *United States v. Brodson*, 390 F. Supp. 774, 783-4 (E.D. Wis., 1975).

3. An examination of the intended operation of Title III reveals that the identification of known parties triggers many of the safeguards built into the statute by Congress to minimize the enormity of the intrusion which it sanctions. Sec. 2518(i)(e), for example, requires that the application contain a "full and complete statement" concerning "all previous applications" for interceptions "involving any of the same *persons* . . . specified in the application." This provision was inserted to forestall potential abuse of the thirty day durational limits on any order authorizing electronic eavesdropping (18 U.S.C. §2518(5)) through submission of multiple applications to different judges. The significance which some courts accord to this provision is illustrated by *United States v. Bellosi*, 501 F.2d 833 (D.C. Cir., 1974), where incriminating evidence secured against three persons by means of a wiretap was suppressed as to all of them because the application failed to relate the prior eavesdropping history of one of the three.

Other protections afforded by Title III also depend completely upon compliance with the identification of all known parties. Sec. 2518(8)(d) requires the judge to

issue notice and inventory upon termination of the eavesdropping "on the *persons* named in the order or the application." In short, compliance with the identification requirement "directly and substantially" implements the congressional purpose in enacting Title III, and any wiretap conducted pursuant to an application and order which fails to meet this requirement is in derogation of the fourth amendment. Since Petitioner was convicted primarily on the basis of direct and derivative evidence gained by use of an unlawful wiretap on telephones located in his residence, his conviction must be reversed.

4. An application for eavesdropping must contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried, or to be too dangerous." Title III, 18 U.S.C. 2518(1)(c) (1970). The Court of Special Appeals held, 352 A.2d at 882-86, that the trial court was not required to conduct an evidentiary hearing on the state's compliance with this provision. Without full compliance with the letter and spirit of Title III, wiretapping is of dubious constitutionality. *Cf., United States v. Giordano, Berger v. New York*, both *supra*. In determining compliance with Sec. 2518(1)(c), which ensures that eavesdropping will be employed only where less intrusive techniques have failed, a trial court's obligation as an impartial arbiter requires it to more than passively rely on the government's conclusory allegations that it has met its statutory duty. *United States v. Giordano, supra; United States v. Ventresca*, 380 U.S. 102 85 S. Ct. 741, 13 L.Ed. 2d 684 (1965). An evidentiary hearing, when requested, is the only way to insure full compliance.

5. Although Petitioner's conviction of several possessory crimes was based solely upon a large trash bag containing certain controlled dangerous substances (the green bag) seized from beneath the porch of the house next door to his residence when the warrant authorized a search only of Petitioner's premises, he was denied standing to contest its admissibility in the trial court. On appeal, the Court of Special Appeals recognized, under the holding in *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed.2d 697 (1960), that Petitioner was erroneously denied standing. It held, however, that this error was harmless because Petitioner had not demonstrated, *on the record*, that his motion to suppress would have succeeded. 30 Md. App. 295, 316, 352 A.2d 874, 887.

It is patently unreasonable and a denial of due process to hold the Petitioner responsible for a failure to develop, on the record, facts which would justify suppression of evidence, where that deficiency was directly induced by error on the part of the trial judge. Nor can this egregious error be said to be insignificant. Without the green bag, the State's evidence against Petitioner on the possessory charges would have been insufficient, as a matter of law, to sustain a conviction. Had Petitioner been afforded a full opportunity to contest the admissibility of the green bag, he might well have demonstrated, for example, that the area in which it was seized was one in which he had a "reasonable expectation of freedom from governmental intrusion," a showing which would require its suppression. *Mancusi v. DeForte*, 392 U.S. 364, 88 S. Ct. 2120, 20 L.Ed.2d 1154 (1968); *Katz v. United States, supra*.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Maryland Court of Special Appeals.

Respectfully submitted,

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APPENDIX

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 674

September Term, 1975

PETER XAVIER HAINA
and
CARLA WYANETTE STRAWBRIDGE

v.

STATE OF MARYLAND

Orth, C.J.
Thompson
Menchine
Mason,
JJ.

Opinion by Thompson, J.

Filed: February 26, 1976

Carla Wyanette Strawbridge and Peter Xavier Haina were convicted for violation of the controlled dangerous substances laws of Maryland by the Circuit Court for Prince George's County. Haina was sentencted to a total of 20 years. Strawbridge was sentenced to a total of 5 years, which sentences were suspended except for 12 days to be served on 6 consecutive weekends and placed on active probation for 5 years. The primary issues on appeal concern the validity of a wiretap order under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, §2510-2520.

Wiretaps

Both appellants initially contend that the wiretap order was invalid because of the failure of the application and order to name the appellant Strawbridge as a person who was committing the offense and whose communications were to be intercepted. The pertinent provisions of 18 U.S.C. §2518 in support of these contentions are:

> (1)(b)(iv) - "Each application shall include the following information: . . . the identity of the person, if known, committing the offense and whose communications are to be intercepted . . . ."
> (4)(a) - "Each order authorizing or approving the interception of any wire or oral communication shall specify - the identity of the person, if known, whose communications are to be intercepted . . . ."

The appellants, relying on a partial quotation of dictum of the United States Supreme Court in *United States v. Kahn*, 415 U.S. 143, 94 S. Ct. 977, 39 L.Ed.2d 225 (1974)*, argue that the standard for determining

*In that case the Court found the named person's wife was not a known party because the government had no information as to her use of the telephones for gambling purposes.

whether or not a person is "known" within the meaning of the statute is whether or not the government had reason to suspect that person's complicity in the commission of the offense and the use of the telephone. In *Kahn, supra,* however, the Supreme Court stated that:

> "We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought." *Id.* at 155.

It is evident then that "probable cause" to believe that a person is committing a specific crime and may be overheard on a specific telephone and not a "suspicion" is the standard to determine whether he is known to the State within the meaning of the statute. *United States v. Bernstein*, 509 F.2d 996 (4th Cir. 1975); *United States v. Donovan*, 513 F.2d 337 (6th Cir. 1975); *United States v. Doolittle*, 507 F.2d 1368 (5th Cir. 1975), reargued 578 F.2d 500;[1] and also *see United States v. Moore*, 513 F.2d 485 (D.C. Cir. 1975) construing the local law for the District of Columbia which is, for these purposes, identical with the general statute.

To determine whether or not there was probable cause to believe that the appellant Strawbridge was violating the controlled dangerous substance laws and would be using the specific telephones we first turn to the affidavit of PFC Howard S. Blake in support of the application for the ex parte order for the interception of the wire communications. Consisting of 24 pages, it detailed through a confidential source, whose reliability is not questioned and is referred to in the affidavit as

[1]Petitions for certiorari are now pending before the Supreme Court in all three of these cases.

(CS), and independent investigation by the affiant the reasons which he believed that the appellant Haina was engaged in a large wholesale illicit drug operation. The affidavit includes the following four references to the appellant Strawbridge:

1. "The (CS) has known Peter Xavier Haina for approximately three (3) years. The (CS) stated that Peter Xavier Haina resides at (5611 Monroe Street, Cheverly, Prince George's County, Maryland). The said (CS) further related that the said residence (5611 Monroe Street, Cheverly, Prince George's County, Maryland), is the residence of Peter Xavier Haina's mother and that Peter Xavier Haina resides in the upstairs portion of the said residence with his girlfriend, a white female known as 'Carla'.

2. "The (CS) has told me that Haina's girlfriend, a white female known as 'Carla', *is also involved in the same scheme to distribute controlled dangerous substances.* The (CS) stated that it has telephoned Haina as recently as the month of June, 1974, and that the (CS) has talked to 'Carla' on the occasions when Haina was not at home. The (CS) further related that 'Carla' had Haina return the (CS's) telephone calls that it had made to Haina when Haina was not at home. The (CS) *further stated that it has had drug related conversations with 'Carla' while talking to her on Haina's telephone number* (927-4724).

"The (CS) stated that on the basis of its many in person and telephone conversations with Peter Xavier Haina and the white female known as 'Carla', it is absolutely positive in its identification of the person's voices over the telephone."

3. "The (CS) also stated to your affiant that Peter Xavier Haina operates a late model Chevrolet, Corvette, gray in color which bears Maryland Registration LR9024. The (CS) also related to your affiant that Haina occasionally operates a Volkswagon, light blue in color which bears South Carolina registration (UIB 147), and that this vehicle belongs to Haina's girlfriend who is known as 'Carla'.

4. "A registration listing furnished to me by the South Carolina Motor Vehicle Administration revealed that South Carolina registration UIB 147 was on a 1970 Volkswagon, listed to one: Carla W. Strawbridge, 111 Arrowwood Road, Columbia, South Carolina.

"This leads your affiant to believe that the above listed Carla W. Strawbridge is the same white female known as 'Carla' who resides with Peter X. Haina at 5611 Monroe Street, Cheverly, Prince George's County, Maryland." (Italics added)

When the facts in the affidavit were taken as a whole, we find that the State had probable cause to believe that Strawbridge was involved in the narcotics operation and would be using either of the two telephones that was to be monitored under the application and order. As stated before the veracity of the informant is not questioned, nor can his basis of knowledge be challenged. *Aguliar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed.2d 637 (1969). The information he recited to Officer Blake was gained from personal dealings with the appellants. While his references to Strawbridge are of a conclusive nature, when they are taken in context they are sufficient. Appellant Haina's operation was conducted through the use of a telephone in the upstairs portion of the house where Strawbridge resided. When Haina was not at home, the informant would have "drug-related conversations" with Straw-

bridge. She would then have Haina return the call. The informant would then purchase narcotics from Haina. These facts sufficiently support the statement that Strawbridge was also involved in the same scheme to distribute controlled dangerous substances. It was not necessary that the informant detail his "drug-related" conversations with Strawbridge in order for the State to have probable cause to believe that Strawbridge was involved in the scheme, when it is obvious, when taken with the other facts, that she was. It should be pointed out that probable cause does not mean mathematical certainty nor even proof beyond a reasonable doubt. It is sufficient if the officers had reasonable grounds to believe that the individual was involved in the illicit activities and in the use of the telephones. *See Collins v. State*, 17 Md. App. 376, 302 A.2d 693 (1973). It was mandatory that Strawbridge be named in the application and order.

Further evidence that Strawbridge should have been named in the application is revealed by the testimony of Officer Blake at the suppression hearing:

Q. "Weren't you aware that Carla Strawbridge was in fact involved with Peter Haina in narcotics operations out of 5611 Monroe Street?

A. "Yes, sir.

Q. "And the reason you were made aware of that was based on the information relayed to you by your informant, is that correct?

A. "Yes, sir.

Q. "And you went ahead and corroborated your informant's information by checking with the Department of Motor Vehicles in South Carolina?

A. "Yes, sir.

Q. "And based on your independent observations?

A. "Yes, sir.

Q. "In your mind, I am talking now prior to July 10, 1974, you were, for all intents and purposes, sure in your mind that Carla Strawbridge was involved with Peter Haina in terms of narcotics operations?

A. "Not completely, no, sir."

While this was not a consideration which could have been taken into account by the judge at the signing of the order, it is further evidence that Strawbridge was a known person to the State at the time they made out the application for the order.

The reasons for the rule that the application and order must name an individual whose conversations there is probable cause to believe is involved in illegal activity and will be using the telephones in question are well set out in *United States v. Bernstein, supra*, which we summarize. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was enacted to protect the policy of wire communications allowing the use of electronic surveillance in investigation of certain crimes. It prohibits wiretapping to collect general intelligence about individuals. Even though a naming of a known offender whose conversations are to be intercepted may not be a constitutional requirement, *United States v. Kahn, supra*, note 15, identification fosters conformity with both constitutional and statutory requirements; "in particular it is important to the exercise of (A) executive approval, (B) prior judicial authorization and (C) subsequent judicial review of interception." For these reasons, *Bernstein* found that identification of known persons was a precondition to a valid intercept order and failure to identify renders an interception contrary to law and invalid as to that person. The

Maryland Court of Appeals in *State v. Siegel*, 266 Md. 256, 292 A.2d 86 (1972), held that there must be a strict compliance with the statute in order to obtain a valid order to engage in wiretapping. The recent case of *Spease and Ross v. State*, 275 Md. 88, 338 A.2d 284 (1975), reiterated its holding insofar as the original application and order were concerned, while holding an unintentional failure to serve notice of the tap upon a named accused does not require suppression of intercepted conversations, in the absence of prejudice. The United States Supreme Court, subsequent to *Seigel, supra*, also held that there must be a strict compliance with a statute in order to obtain a wiretap order. *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L.Ed.2d 341 (1974). The lack of strict compliance with this condition precedent to a valid order in regards to Strawbridge, prevents the introduction of any evidence derived from the wiretap into evidence against her. *Bernstein, supra*; 18 U.S.C. §2515, *infra*.

The State argues (assuming she should have been named in the warrant) her convictions for the simple possession of cocaine and of marijuana should not be reversed. The evidence shows that while the wiretaps were in progress the appellant Haina engaged in two telephone calls in which he was informed that a confederate had been arrested and had named him as one involved in the drug traffic. Haina's response that that he intended to "clean house." As the result of hearing these conversations, the police officers stationed observers at the Haina home and observed the appellant Strawbridge bring a green bag out of the front door of the home and dispose of it after she walked to the side of the house out of the sight of the officers. A

subsequent search located the bag under the porch of a neighbor's house. The bag contained cocaine and marijuana which serve as a basis for appellant Strawbridge's convictions and supported the several convictions of the appellant Haina. The wiretaps showing appellant Strawbridge's conversations were introduced into evidence and showed that her possession was not that of an innocent agent, therefore, her conviction must be reversed for this reason alone.

We think her convictions must be reversed for yet another reason. It is apparent from what we have said, that Strawbridge was arrested directly as a result of the wiretap on her residence even though she was not a party to the conversations which precipitated her being found in possession of the prohibited controlled dangerous substances; thus, if she has standing which we will discuss hereinafter, the physical evidence as to her must also be suppressed. *Carter v. State*, 274 Md. 411, 337 A.2d 415 (1975), held that Maryland must follow the fruit of the poison tree doctrine first set up in *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963). In *Carter, supra*, the Court held that information obtained by an illegal wiretap could not be used as a basis for procuring a search warrant which was otherwise valid. In the instant case, however, we would be required to hold the seizure of the narcotics invalid as to the appellant Strawbridge under the clear language of the federal statute, which states:

18 U.S.C. §2515:

> "Whenever any wire or communication has been intercepted, no part of the contents of such communication and no *evidence derived therefrom* may be received in evidence in any trial, hearing,

or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. §2518:

(10)(a) "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, *or evidence derived therefrom*, on the grounds that -

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval. . . ." (Italics added)

In *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L.Ed.2d 176 (1969), it was found that the term "aggrieved party" did not apply to everyone against whom damaging evidence derived from an illegal wiretap was introduced. In order to suppress the party must have had his right to privacy breached by the surveillance. A petitioner is "entitled to the suppression of government evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not

he was present or participated in those conversations." *Alderman, supra* at 176. It is obvious, therefore, from the legislative history of Title III and the Supreme Court interpretation that the term "aggrieved party" is to be construed in accordance with existing standing rules to invoke the Fourth Amendment for a suppression motion.[2] In the case at bar evidence was introduced against Carla Strawbridge which State officials obtained by overhearing conversations occurring from her residence. For this reason she had standing to challenge the fact that she was not named in the application and order.

The appellant, Haina, contends inasmuch as the warrant was invalid as to appellant, Strawbridge, he as well as she is entitled to object to all evidence that was obtained as a result of the wiretap. As we have said before since it was also his residence he would appear to have standing. As pointed out in *Alderman, supra* at 180, n. 11, however, a property owner's right to object comes from a violation of his rights, not from an invasion of the rights of his family or invitees. In the case at bar Haina was named in the application and order; therefore, none of his privacy rights were illegal invaded. *Alderman, supra,* also held that evidence inadmissible against one co-conspirator is not inadmissible as to another co-conspirator.

To support his argument appellant Haina cites *United States v. Bernstein; United States v. Donovan,* and *United States v. Moore,* all *supra.* We see no support to appellant Haina's position in any of them. On the contrary the language of all indicates quite clearly that only the unnamed person can benefit from this type of invalidity in the application and order for the wiretap. *United States v. Bellosi,* 501 F.2d 833 (D.C. Cir. 1974)

[2] See S. Rep. No. 1097, 90th Cong., 2d. Sess., 91 (1968).

tends to support the appellant's argument. We do not find it persuasive, however, because although anyone aggrieved has standing under the statute this does not mean he can prevail unless his own privacy has been invaded.

Haina's second contention is that the application did not contain a statement as to whether or not other investigative procedures had been tried and failed, or why they appeared unlikely to succeed if tried, or to be too dangerous.

A statement describing the feasibility of other investigative techniques was in compliance with 18 U.S.C. §2518(1)(c). This statute reads as follows:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> "(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;"

Detective Blake's affidavit was incorporated in the application and included the following:

> "Further, it appears to your affiant that the use of electronic devices to intercept and record certain narcotic related telephonic communications of Peter Xavier Haina and others yet unknown, is required to prevent the further commission of the aforementioned crimes and to secure evidence of the commission of the said crimes.
>
> "Your affiant represents that the particular types of communications sought to be intercepted

> and recorded are those concerning violations of the laws relating to controlled dangerous substances, and more particularly, those telephonic communications between Peter Xavier Haina, and his suppliers of controlled dangerous substances are stored and others yet unknown concerning:
>
> "(1) The dates, times, places, and manner in which illicit drugs will be delivered to Peter Xavier Haina and others yet unknown,
>
> "(2) The dates, times, places, and manner in which illicit drugs are distributed by Peter Xavier Haina and others yet unknown, and
>
> "(3) The prices that the above mentioned persons pay for illicit drugs and the dates, times, places and manner of payment for the said drugs.
>
> "These wire communications will be between the aforementioned persons and their co-conspirators in the alleged scheme to distribute controlled dangerous substances and narcotic drugs and the wire communications to be intercepted will concern:
>
> "(1) The identity, telephone numbers, place of residence, places of purchase, and the locations where the controled dangerous substances are stored by the co-conspirators, between the aforementioned persons."
>
> "The (CS) further related that Haina has become extremely apprehensive about possible police interference with his illicit drug business and that Haina has since removed large quantities of drugs from within his residence. The (CS) related that Haina's present method of doing business is for a prospective purchaser of cocaine, marijuana, or other control dangerous substances to telephone Haina at his home, using either (927-4724) or (864-9433). Haina then tells the purchaser to go to a location, and then Haina calls a third person

using one of the same two (2) telephone lines. Haina in his conversation with the third person, directs the third person to get the necessary quantity of drugs from a 'stash' (drug jargon known by your affiant as meaning a location where narcotics are stored) and to go to a prearranged location where the three (3) men, meaning Haina, the purchaser, and the third person meet and the drug and money are exchanged, or Haina himself will go to the location where the drugs are stashed and transport the drugs personally to the prearranged location where he will meet with the purchaser and the transaction of the money and drugs is made.

"The (CS) further stated that Haina, as a dealer in controlled dangerous substances normally will deal only with dealers and will not sell quantities less than wholesale quantities. That is, Haina does not usually make sales to the ultimate users of the illicit drugs. Haina has told the (CS) that by dealing only with dealers, Haina deals with persons whom he personally knows and trusts.

"I questioned the (CS) about the possibility of having the (CS) introduce an undercover police officer to Haina so that a police officer could purchase controlled dangerous substances directly from Haina, but the (CS) stated that this would be impossible due to Haina's policy of dealing only with persons whome he has known and sold controlled dangerous substances to for a long time.

". . . The source stated that the execution of a search and seizure warrant would be of little value since Haina did not keep his large quantities of drugs at his house any more and that Haina always has the drugs brought from a 'stash' to a randomly picked location often prearranged over the telephone for his drug transactions. . . .

"The (CS) stated that it does not know and cannot learn the locations of any of Haina's

'stashes'. The (CS), despite its long friendship with Haina, has been unable to ascertain Haina's source of illicit drugs, other than that one of the major sources is in Prince George's County, Maryland and that another major source of supply is in the state of Virginia.

" . . .

"The (CS) was questioned by your affiant as to Haina's driving habits and it was related to your affiant by the (CS) that Haina often drives his vehicle in an erratic manner by using excessive speeds and then by slowing his vehicle down considerably and making abrupt turns without warning. The (CS) stated that Haina constantly looks in his rear view mirror and uses the aforementioned maneuvers to make sure he is not being followed.

" . . .

" . . . I have attempted to follow Haina, with the help of other members of the Prince George's County, Maryland, Police Vice Control Section, on these occasssions by placing moving motor vehicle surveillance on him and his vehicle. On all of these occassions Haina would drive in an erratic manner by rapidly accelerating his vehicle and then abruptly reducing speed, and would also make abrupt turns without warning. From my previous experience in automobile surveillance of suspected drug violators, I recognize Haina's erratic driving pattern to be a counter-surveillance techniques, frequently used by drug violators.

"Your affiant then contacted Sergeant David W. VanDyke of the Prince George's County Police Department Vice Control Section, who had conducted a narcotics investigation on the same Peter Xavier Haina during the month of April, 1974, and questioned Sergeant VanDyke as to the methods of moving surveillance he employed while

attempting to follow Haina, while Haina was operating his vehicle. Sergeant VanDyke stated to your affiant that Haina drove in a very erratic manner as to elude anyone that might be following him. Sergeant VanDyke further related to your affiant that the case he investigated on Haina was closed on an inactive status, since all surveillance methods failed to reveal any narcotic activity and he was unable to develop an informant to supply him with any information, as to Haina's drug related activities.

"Your affiant then reviewed the transcript from the Maryland Motor Vehicle Administration which revealed that Peter Xavier Haina has received at least six citations for exceeding the posted speed limit. This further confirms the confidential source's statement that Peter Xavier Haina drives in an erratic manner and fits into the pattern of driving observed by your affiant during the attempted surveillance period previously mentioned.

"Your affiant discontinued the surveillance at this point. My decision to terminate surveillance on Haina's residence was that my presence in the neighborhood, as well as my driving past the residence, had begun to attract attention of some of the other residences in the neighborhood. This occurred despite the fact that I used a variety of undercover vehicles, which are completely unidentifiable as Police cars, to conduct the surveillance, seldom using the same vehicle on any two consecutive occassions. As a result of the attention any presence had attracted, I feared that one of two things would happen: (1) that Haina, himself, would observe that his house was under surveillance, or (2) that one of Haina's neighbors would inform him that his house was under surveillance. Therefore, after discontinuing the aforementioned types of surveillance, all members

of the Vice Control Section stayed completely away from Haina's residence for over a week.

"By the time surveillance on Haina's residence was terminated on June 30, 1974 I had concluded that the confidential source had been correct in its assertion that Haina no longer allowed illicit drug dealers to come to his residence and make their drug transactions as no apparent drug related traffic was observed going to or from Haina's residence."

The affidavit recited also other information concerning the reasons other investigative techniques would not work but we think we have recited sufficient portions to show the lack of a substantial basis for the appellant's argument concerning the feasibility of other investigative techniques. Nevertheless we will set out each of the techniques that the appellant alleges could have been employed together with our comment thereon:

"(1) confidential informants (An informant was used but it was never explained why he, *or* she never testified at the trial.)"

We see no reason why the application should or could explain why the confidential informant did not testify at trial.

"(2) investigation of criminal backgrounds (Some names of persons with criminal records were obtained from the appellant's seized phone books but many names in the books were not investigated at all)"

These records had been seized in a raid on the appellant's premises two years earlier. It would seem that the investigation of the criminal background of persons mentioned in such stale information would not necessarily be of any current value unless and until it

was established that they were still engaged with the appellant in an illegal activity.

> "(3) mobile surveillance of an automobile (The appellant was followed at times but he was not followed when he was with co-defendant Strawbridge)"

We see no reason the appellant Haina can complain because he was not followed the three times the officers saw him with the appellant Strawbridge.

> "(4) fixed surveillance of a residence (Appellant's residence was monitored for less than a month but there was no systematic effort to obtain the identities of all persons dealing with the appellant)"

We think the affidavit adequately explained why the appellant's residence was not subjected to further surveillance.

> "(5) direct contact within the subject (There was some testimony, mostly conclusory, from Det. Davis of the Maryland State Police that direct contact was not possible)"

We feel that direct contact would have been impossible because, as stated in the affidavit, appellant Haina only dealt with known and trusted friends.

> "(6) search warrants (A search warrant of appellant's residence was obtained from District Court Judge Vincent Femia on June 22, 1974 but it was never executed)"

The record shows that the warrant was not executed because the police officers received information the appellant had moved the narcotics from his home. Furthermore, the police are under no obligation to make an arrest of one person before the identities of the other members of a conspiracy are determined. *See*

United States v. Armocida, 515 F.2d 29 (3rd Cir. 1975).

> "(7) immunity grants (Despite the fact that the controlled dangerous substance law specifically provides for the granting of immunity Art. 27 §298(c), the record discloses that only once during trial did the State attempt to grant immunity and immunity was not mentioned at all in the application.)"

Once again we do not see how what happened at trial would have any bearing on what an application should show but we think the application and accompanying affidavit sufficiently explain the inability to penetrate the appellant's operation and that any attempt to grant immunity to any persons involved would simply have led to appellant learning he was under intensive investigation.

> "(8) pen register's. (The record discloses no use of pen registers.)"

A pen register is simply a device attached to a telephone which discloses the numbers called from that phone. Under the facts alleged the application, it seems apparent to us that resort to pen registers, which do not record conversations, would be of limited value and would have to have been thereafter followed by a regular wiretap.

> "(9) eavesdropping on an informer (*Osborn v. United States*,[3] *supra* authorizes this type of investigative technique but no mention was ever made in the record why this means would not be feasible)."

It is apparent the mere recording of a conversation of the informer with Haina would not be likely to reval the names of the others who were involved in the

[3] 385 U.S. 323, 87 S. Ct. 429, 17 L.Ed.2d 394 (1966)

purchase and distribution of the narcotics in the Haina organization.

We agree fully with the appellant's quote from *United States v. Lanza*, 356 F. Supp. 27, 30 (M.D. Fla. 1973) as follows:

> "The purpose of the exhaustion requirement is not to foreclose the use of electronic surveillance until the state has exhausted every possible means of obtaining a viable case against the subjects, but merely to inform the authorizing magistrate or judge of the nature and progress of the investigation and the difficulties inherent in the use of normal techniques."

In short, it is difficult for us to imagine that the application could have more fully complied with the section of the statute requiring the State to show why other investigative techniques would not succeed.

Indictment

Haina alleges counts 1 and 17 of the indictment are unconstitutionally vague. Count 1 of the indictment charged that the appellant " . . . unlawfully conspired to violate the controlled dangerous substance laws of the State of Maryland. . ." and Count 17 of the indictment charged that the appellant " . . . .unlawfully did keep and maintain . . . a common nuisance, for the purpose of storing, concealing, administering or dispensing controlled dangerous substances. . ." The first count of the indictment follows the statutory form set out in *Md. Code*, Art. 27, §40 and is sufficient without specifying the particular drug involved. *Scarlett v. State*, 201 Md. 210, 93 A.2d 753 (1953) and *Quaglione v. State*, 15 Md. App. 571, 292 A.2d 785 (1972).

Count 17 of the indictment followed the language of *Md. Code*, Art. 27, §286(5) and thus was sufficient. *Baker v. State*, 6 Md. App. 148, 250 A.2d 677 (1969). Although the trial judge denied a demand for particulars he pointed out in ruling on a motion to dismiss Count 1 of the indictment that appellant Haina had access to all of the State's evidence and knew exactly the charges against him.

Hearsay Evidence to Establish Conspiracy

Appellant Haina, citing the familiar rule that a conspiracy must be shown by evidence *aliunde* before hearsay declarations of a co-conspirator can be admitted into evidence, contends that inasmuch as all of the evidence of the conspiracy was that recorded on the tapes, the tapes could not be admitted for that purpose. He relies primarily on *United States v. Rich*, 518 F.2d 980 (8th Cir. 1975). Although the facts of that case are not entirely clear, it seems that the statements there were statements made by a conspirator out of the presence of the co-conspirators. The Court did not reach the point because it found ample evidence outside the declarations of the co-conspirators to prove the conspiracy. In making his arguments, appellant overlooks the fact that the declarations of one co-conspirator are admissible against a co-conspirator when forming a part of the conversation between them and the acts of one are admissible against the other when done in the latter's presence and while the conspiracy is in progress. *See Mason, Taylor and Taylor v. State*, 18 Md. App. 130, 305 A.2d 492 (1973); U.S. *cert. denied*, 416 U.S. 907; *Irvin v. State*, 23 Md. App. 457, 328

A.2d 329 (1974), *aff'd*, 276 Md. 158 and 3 Underhill, *Criminal Evidence* §81 (5th ed. 1957). In the instant case, it is apparent that the bulk of the conversations which showed the conspiracy were made under these conditions, therefore, the evidence was not hearsay and constituted substantive proof of the conspiracy. In addition, appellant makes the far-fetched argument that because the tapes of the telephone conversations were introduced through the testimony of Detective Blake all of the tapes were hearsay evidence. Detective Blake testified as to the accuracy of the recordings. The recordings were played to the jury. This did not make the recordings hearsay. Indeed, the appellant's own statements on the tapes were sufficient independent evidence of the conspiracy to support the admission of the few statements of some of his co-conspirators when he was not a party to the conversations. For a further discussion see 58 A.L.R.3d 598.

Appellant Haina's Standing to Contest the Admission of the Green Bag and Its Contents Into Evidence

As we have indicated the green bag was seized on a neighbor's property. It was not accurate to say that the appellant had no standing to object to its introduction into evidence under *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed.2d 697 (1960), as recently interpreted by the Maryland Court of Appeals in *Duncan & Smith v. State*, No. 88 Sept. Term, 1975, filed February 4, 1976 because any time, in the context of a possessory crime, an accused is alleged to be in possession of an object he has standing to object to its introduction into evidence and to suppress it if it is

illegally seized as to him. In the instant case, however, there was no showing to indicate that the appellant had any right to store his property under his neighbor's porch, therefore, it was simply not an area in which he had a right to expect privacy. The *Jones, supra*, rule is limited to a person rightfully on the property. The appellant's reliance on *Garrison v. State*, 28 Md. App. 257, 345 A.2d 86 (1975), is misplaced because in that case it was determined that the police officers were trespassers and spying on the appellant in the basement of an apartment house at a time he had a right to be in that part of the premises. Appellant Haina attempts to bring his case within that rule by alleging that one of the officers who was shown to be standing to the rear of the appellant's property concealed in a woods was on the appellant's property. The record does not support such a finding because there is nothing to show that the woods was a part of the appellant's property.

JUDGMENT REVERSED AS TO STRAWBRIDGE.
JUDGMENT AFFIRMED AS TO HAINA.
COSTS OF THE APPELLANT STRAWBRIDGE TO BE PAID BY PRINCE GEORGE'S COUNTY.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-232

PETER XAVIER HAINA,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
PRELIMINARY COMMENTS	1
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT:	
I. An application and order authorizing electronic interception of telephone conversations transpiring in a residence jointly occupied by two persons which names only one person, although both are "known" pursuant to 18 U.S.C. 2518 (1) (b) (iv) and 2518 Section (4) (a), renders inadmissible only that evidence obtained against the "known" but unidentified person	4
II. The Court of Special Appeals was correct in holding that the State had fully complied with 18 U.S.C. 2518 (1) (c)	7
III. Failure to grant a petitioner, charged with a possessory crime, the automatic standing required by *Jones v. United States* did not deprive Petitioner of due process of law	12
CONCLUSION	14

TABLE OF CITATIONS

Cases

	PAGE
Alderman v. United States, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969)	11, 12
Duncan v. State, 276 Md. 715, 351 A.2d 144 (1976)	12
Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)	12
United States v. Bernstein, 509 F. 2d 996 (4th Cir. 1975), *cert. pending*, 421 U.S. 962 (1975)	5, 7
United States v. Bleau, 363 F. Supp. 438 (D.C. Md. 1973), *aff'd*, 509 F. 2d 996	10
United States v. Civella, 533 F. 2d 1395 (8th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3135 (U.S. June 14, 1976), (No. 75-1813)	6
United States v. Donovan, 513 F.2d 337 (6th Cir. 1975) *cert. granted*, 44 L.W. 3471 (U.S. 1976) (No. 75-212)	5, 6, 7
United States v. Falcone, 364 F. Supp. 877 (D.C.N.J. 1973) *aff'd*, 500 F.2d 1399, 1401	10
United States v. James, 494 F. 2d 1007, 1015 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020	9, 10
United States v. Pacheco, 489 F.2d 554, 565 (5th Cir. 1974) *Rehearing and Rehearing En Banc denied*, (March 7, 1974)	9
United States v. Staino, 358 F. Supp. 852 (D.C.C.D. Pa. 1973)	10
United States v. Whitaker, 343 F. Supp. 358 (D.C.E.D. Pa. 1972) *rev'd on other grounds*, 474 F.2d 1246 (3rd Cir. 1973), *cert. denied*, 412 U.S. 950, 953	10

Constitutional Provisions and Statutes Involved

	PAGE
Fourth Amendment to the Constitution of the United States	2, 11
Fourteenth Amendment to the Constitution of the United States	2
Article 27, Sections 276-302, Annotated Code of Maryland (1957, 1976 Repl. Vol.)	2
18 U.S.C., Section 2518 (1) (b) (iv)	4
18 U.S.C., Section 2518 (4) (a)	4
Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A., Sections 2510-2520	4, 7, 10

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court dated October 19, 1976.

OPINION BELOW

The Opinion of the Court of Special Appeals of Maryland (Appendix 1a-23a of Petition) is reported in 30 Md. App. 295, 352 A.2d 874 (1976). The denial of the motion for writ of certiorari by the Court of Appeals of

Maryland has not been officially reported to date. However, a denial of review by certiorari was ordered on May 25, 1976.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to the provisions of Title 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

Respondent adopts in substance the questions presented by Petitioner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner alleges that the Fourth and Fourteenth Amendments to the Constitution of the United States are involved.

STATEMENT

Petitioner Peter Xavier Haina and fourteen other persons were indicted by the Grand Jury of Prince George's County, Maryland in a twenty-one count indictment charging related violations of the controlled dangerous substance laws as codified in Article 27, Sections 276-302, Annotated Code of Maryland (1957, 1976 Repl. Vol.). Petitioner made a pretrial motion to suppress the evidence obtained through the use of a wiretap. Petitioner was tried before a jury on May 19, 1975. At trial, Petitioner renewed his motion to suppress the evidence obtained through the use of a wiretap. Petitioner also sought the suppression of evidence found beneath the porch of the house next door. Both motions were denied. Petitioner was found guilty on six counts of the indictment and sentenced for a total of twenty years.

On appeal to the Court of Special Appeals Petitioner's case was consolidated with that of Clara Strawbridge. Strawbridge, who had shared an apartment with the Petitioner, had also been convicted as a result of the evidence obtained from the wiretap of Petitioner's residence. The affidavit of Detective Blake requested "the use of electronic devices to intercept and record certain narcotic related telephonic communications of Peter Xavier Haina and others yet unknown . . ." (Affidavit, p. 24). No such request was made to intercept the communications of Appellant Strawbridge. In similar fashion, Strawbridge was not identified in the Order signed by Judge James Taylor on July 10, 1974. The Order authorized the interception and recording of "telephonic wire communications of Peter Xavier Haina and other persons yet unknown . . ." (Order, p. 2). The Court of Special Appeals agreed with both Strawbridge and the Petitioner that Strawbridge was a named person, and therefore she should have been named in both the application and order for the wiretap. Her convictions were reversed. However, the Court of Special Appeals held that the failure to name Strawbridge was to no avail to Petitioner, and therefore affirmed his convictions. See Appendix to brief of Petitioner, pages 1a-23a.[1]

In the instant Petition for a writ of certiorari, Petitioner again contends that the wiretap order was invalid even as to Petitioner because of the failure of the application and order to name Petitioner's co-defendant, Strawbridge, as a known person who was committing the offense and whose communications were also intercepted. As a result of the alleged invalid wiretap, Petitioner urges that *all* direct and derivative

[1] All future references to the opinion of the Court of Special Appeals will make reference to the pages in the Appendix to the brief of Petitioner, and shall begin with the letter "A".

evidence obtained through the use of that wiretap should have been excluded, not only as to Strawbridge, but also as to Petitioner.

The Respondent has found no case to support the contentions of the Petitioner. It is submitted that the authorities cited by the Petitioner do not mandate the granting of a writ of certiorari.

ARGUMENT

I.

AN APPLICATION AND ORDER AUTHORIZING ELECTRONIC INTERCEPTION OF TELEPHONE CONVERSATIONS TRANSPIRING IN A RESIDENCE JOINTLY OCCUPIED BY TWO PERSONS WHICH NAMES ONLY ONE PERSON, ALTHOUGH BOTH ARE "KNOWN" PURSUANT TO 18 USC 2518 (1)(b)(iv) and 2518 § (4)(a), RENDERS INADMISSIBLE ONLY THAT EVIDENCE OBTAINED AGAINST THE "KNOWN" BUT UNIDENTIFIED PERSON.

The convictions of Petitioner were obtained primarily through the use of conversations intercepted by a wiretap authorized under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-2520.[2] Section 2518(1)(b)(iv) provides in pertinent part:

> "(1) Each application for an order authorizing the interception of a wire or oral communication . . . shall include the following information:
>
> '(iv) the identity of the person, if known, committing the offense and whose communications are to be interrupted."

Likewise, the actual order authorizing the interception must also specify "the identity of the person, if known, whose communications are to be intercepted . . ." Section 2518(4)(a).

[2] For the sake of brevity, future reference will either be to "Title III" or the "Act".

An issue similar to the issue presented herein by the Petitioner was presented to the Court of Appeals for the Fourth Circuit in *United States v. Bernstein*, 509 F.2d 996 (4th Cir. 1975), *cert. pending*, 421 U.S. 962 (1975). The facts in *Bernstein* reveal that the first intercept order was followed by three extensions. Although Bernstein was "unknown" prior to the period of the original order, probable cause to believe that Bernstein would be heard on a tapped telephone was obtained as a result of the first interception. The District Court found that the failure of the government agents to identify Bernstein in the application for the first extension and subsequent applications rendered the interceptions obtained after the extension unlawful with respect to him. Affirming on appeal, the Court of Appeals concluded:

> "The Act's identification requirements form an integral part of the system Congress created to protect privacy by executive and judicial control of electronic surveillance. Identification of known persons, as required by § 2518(1)(b)(iv), is therefore a statutory precondition to a valid intercept order, and failure to identify renders an interception contrary to law and invalid *as to that person*." (Emphasis supplied) 509 F.2d 1001.

Bernstein appears to specifically limit the invalidity of the order for failure to name a known person to the known person only. The Petitioner was known, and he was specifically named in both the application for the wiretap and the intercept order. It is therefore submitted that the claim of the Petitioner that his convictions should be reversed because Strawbridge was not named in the application for the wiretap or in the intercept order is without merit.

In *United States v. Donovan*, 513 F.2d 337 (6th Cir. 1975), *cert. granted*, 44 L.W. 3471 (U.S. 1976) (No. 75-

212), the District Court held ". . . that the defendants . . . were 'known' to the Government within the meaning of the statute and that failure to include their names in the applications and orders contravenes the statute and necessitates the suppression of the contents of intercepted communications and the evidence derived therefrom *as to these defendants*" (emphasis supplied). At 332. The three defendants in question were among seventeen persons indicted for their participation in illegal gambling activities. Just as in the case at bar, a major portion of the evidence which supported those indictments was gathered pursuant to an order authorizing the interception of wire communications. On appeal, the Court of Appeals "affirm[ed] the order of the District Court granting the motions to suppress by [the three defendants]." At 342. Only the evidence as to the three defendants known but not named in the application and order for the interception was suppressed; the evidence as to the remaining defendants was undisturbed. It is for this same reason that certiorari in the instant case should not be granted. The evidence illegally obtained against Strawbridge by the failure of the State to name co-defendant Strawbridge should have been suppressed as to her alone. Because Strawbridge was the only person who could benefit from the omission according to the holding in *Donovan*, the position of the Petitioner remains unchanged.

United States v. Civella, 533 F.2d 1395 (8th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3135 (U.S. June 14, 1976) (No. 75-1813) involved five defendants. The basic question common to all defendants was based on whether or not the evidence obtained by a wiretap should be suppressed as to the respective defendants. The defendants argued that after a period of time the government had probable cause to believe that several of them were involved in the criminal activity under

investigation. They contended that the failure of the government to identify them in the application and order, after obtaining this knowledge, made the application and order fatally defective because only one defendant, Tousa, was named as the sole interceptee. The Court stated that this argument was clearly "unavailable to Tousa, who was named in the application and order." At 1402. By analogy to the case at bar, this same argument is clearly unavailable to Petitioner because he, like Tousa, had been properly named in both the application for the wiretap and the ensuing intercept order.

Petitioner relies on *Bernstein* and *Donovan* for the proposition that the naming of a known party in a warrant application for electronic eavesdropping is basic to Title III, and that the failure to do so will justify exclusion of evidence seized pursuant to the interception order. This statement is true but incomplete. *Bernstein* and *Donovan* allow exclusion of evidence relating only to the specific party who was known but not identified, but this same legal concept is to no avail to any parties properly named in the application and order. Petitioner, having been properly named in the application and order, can rely neither upon *Bernstein* nor *Donovan* to support his position.

II.

THE COURT OF SPECIAL APPEALS WAS CORRECT IN HOLDING THAT THE STATE HAD FULLY COMPLIED WITH 18 U.S.C. 2518(1)(c).

In further support of his petition, Petitioner also argues to this Court that "[a]n evidentiary hearing, when requested, is the only way to insure full compliance" with Title III, 18 U.S.C. 2518(1)(c) (1970) which provides:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;".

It has been held that:

> "The purpose of the exhaustion requirement is not to foreclose the use of electronic surveillance until the state has exhausted every possible means of obtaining a viable case against the subjects, but merely to inform the authorizing magistrate or judge of the nature and progress of the investigation and the difficulties inherent in the use of normal techniques." *United States v. Lanza*, 356 F. Supp. 27, 30 (N.D. Fla. 1973).

Petitioner states that "[t]he Court of Special Appeals held, 352 A.2d at 882-86, that the trial court was not required to conduct an evidentiary hearing on the state's compliance with this provision" (P. 10). This was neither the issue raised nor the holding of the Court. The Court was responding to Petitioner's second contention, in which the Petitioner argued before the Court of Special Appeals "that the application did not contain a statement as to whether or not other investigative procedures had been tried and failed, or why they appeared unlikely to succeed if tried, or to be too dangerous" (A. 12a). The issue of a hearing was neither raised nor discussed on appeal. The question raised by Petitioner on appeal was limited to the alleged failure of the application to give a full and complete

statement describing the feasibility of other investigative techniques. The Court of Special Appeals was not given an opportunity to consider the question presented in the Petition to *this* Court regarding an alleged lack of an evidentiary hearing.

It was held in *United States v. Pacheco*, 489 F.2d 554, 565 (5th Cir. 1974), *Rehearing and Rehearing En Banc denied*, (March 7, 1974):

> "Finally, we note that the purpose of the requirement in Section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques. *United States v. King*, S.C. Cal., 1971, 335 F. Supp. 523, 535; Senate Rep. No. 1097, 1968 U.S. Code Cong. & Admin. News pp. 2112, 2190."

There are numerous other cases which appear to support the position of the Respondent based upon the affidavit of Detective Blake in the instant case. As in the application for most search warrants, it was held in *United States v. James*, 494 F.2d 1007, 1015 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020, that an "affidavit must be read and interpreted in a commonsense and realistic fashion." Continuing at page 1016, the United States Court of Appeals stated:

> "Considering the matter in a practical and commonsense fashion we find that although the informant had made two purchases of drugs from Jackson it was reasonable to believe that these transactions were only minor items in Jackson's enterprise, and the exposure of his entire operation required different and more sophisticated techniques. Certainly it was clear that surveillance techniques and infiltration would be frustrated by Jackson's extreme caution."

Factually, the affidavit in *James* pertaining to one Lawrence Jackson was very similar to the affidavit pertaining to Petitioner in the case at bar. In *James* the affidavit indicated that Jackson operated under tight security; that he drove in an erratic manner in order to avoid detection by surveillance; and that Jackson would not sell heroin to strangers. Under this set of circumstances, the Court affirmed the convictions holding that the interception of wire communications was the only investigative procedure likely to succeed. The application in the case at bar recited these very same circumstances; enumerated numerous other techniques which had been attempted; and set forth reasons why these other techniques had not been successful (A. 12a-20a).

Other cases, such as *United States v. Bleau*, 363 F. Supp. 438 (D.C. Md. 1973), *aff'd* 509 F.2d 996; *United States v. Staino*, 358 F. Supp. 852 (D.C.C.D. Pa. 1973); *United States v. Falcone*, 364 F. Supp. 877 (D.C.N.J. 1973), *aff'd* 500 F.2d 1399, 1401; and *United States v. Whitaker*, 343 F. Supp. 358 (D.C.E.D. Pa. 1972) *rev'd on other grounds*, 474 F.2d 1246 (3rd Cir. 1973), *cert. denied*, 412 U.S. 950, 953, support Respondent's position that there had been full compliance with both the letter and spirit of Title III, 18 U.S.C. 2518(1)(c). These cases also reinforce the holding of the Court of Special Appeals.

The opinion of the Court of Special Appeals recited portions of the affidavit at length concerning investigative techniques attempted and rejected. The Court stated "we think we have recited sufficient portions to show the lack of a substantial basis for [Petitioner's] argument concerning the feasibility of other investigative techniques" (A. 17a).

In order to ascertain whether there was compliance with the requirements of the Act, an evidentiary hearing is never required and usually not necessary. A judge is capable of determining whether there was compliance with this portion of the Act by reviewing the affidavit.

The affidavit in this case was lengthy and detailed. The Court set out and commented on all of the techniques which Petitioner alleged could have been employed (A. 17a-20a). The Court concluded by saying:

> ". . . it is difficult for us to imagine that the application could have more fully complied with the section of the statute requiring the State to show why other investigative techniques would not succeed" (A. 20a).

Petitioner also contends that "[e]very person who lives in a particular residence and exercises dominion and control over those premises has a constitutional right, under the fourth amendment, against unreasonable and unauthorized intrusions into his home, and that right is infringed not only by violation of his own privacy, but also by improper interference with the privacy of his invitees and fellow residents. *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969)" (P. 7). However, in *Alderman* this Court rejected the petitioner's expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it. In that case, the defendant had demanded a retrial if any of the evidence used to convict him was the product of unauthorized surveillance regardless of whose Fourth Amendment rights the surveillance violated. This Court held that "[t]here is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party." 394 U.S. 174. As

pointed out in *Alderman* at 180, n.11, however, a "homeowner has the right to expect privacy for himself, his family, and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated, but because *his own* were." (Emphasis supplied). In the case at bar, Petitioner was named in the application and order; therefore, none of *his* privacy rights were illegally invaded. *Alderman* also held that evidence admissible against one co-conspirator is not admissible as to another co-conspirator.

III.

FAILURE TO GRANT A PETITIONER, CHARGED WITH A POSSESSORY CRIME, THE AUTOMATIC STANDING REQUIRED BY *JONES v. UNITED STATES* DID NOT DEPRIVE PETITIONER OF DUE PROCESS OF LAW.

Petitioner contends that since the trial court erroneously held that Petitioner lacked standing to object to the admission of evidence procured by the allegedly unlawful search and seizure, the Court of Special Appeals then erred in finding that Petitioner failed "to develop, on the record, facts which would justify suppression of evidence" (P. 11) This deficiency in the record, Petitioner contends "was directly induced by error on the part of the trial judge" (P. 11).

Respondent agrees that Petitioner may have had automatic standing according to *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), and *Duncan v. State*, 276 Md. 715, 351 A.2d 144 (1976). However, Respondent contends the error, if any, on the part of the trial court in overlooking automatic standing in no way prejudiced the Petitioner.

First, although the trial court did not accept automatic standing, the trial court therefore asked the

question: "Did the defendant [Haina] have a reasonable expectation of privacy as to his neighbor's property?" Had the trial court found automatic standing, Petitioner says he would have been able to argue that he had that expectation. Respondent submits that the trial court openly invited evidence on exactly that issue by virtue of the inquiry directed at the Petitioner. Petitioner freely and voluntarily declined to present any such evidence at his trial, and he should therefore be precluded from ever raising this issue before this Court.

Secondly, a complete evidentiary hearing was held, out of the presence of the jury, whereby Petitioner was given every opportunity to present evidence on the question of the admissibility of the evidence in question. Petitioner and Strawbridge indicated that they wanted a hearing on the validity of the search warrant, pursuant to which they claimed the evidence in question was seized. The trial court held such a hearing on the seizure. Respondent argues that the attorneys and the trial court treated this hearing as including both the standing of Petitioner as well as the merits, *i.e.*, the question of whether the evidence was illegally seized. Most notably, Petitioner's co-defendant, Strawbridge, spoke to both standing and the merits in argument after the evidence was presented.

Petitioner elected his theory of why the evidence against him should have been suppressed. He stated that the items were seized pursuant to a search warrant and that either 1) the search warrant was invalid because of the wiretap or 2) the search warrant, running to the Petitioner's property, could not be used to search neighboring property. Because the finding of the trial court on the standing issue followed the Petitioner's decision not to present evidence, it cannot be said that the deficiency of the record was caused by the finding of the trial court.

Lastly, the record reveals that the green bag in question had been placed under the porch of the adjoining house. The Respondent would submit that one who abandons or discards property cannot later claim that there was an illegal seizure of such property.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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